COLLECTIVE BARGAINING AND BEYOND

THE ROLE OF INTEREST ARBITRATION IN DEVELOPING ECONOMIES

Presented by:

Nigel Carman, Fasken Martineau, Johannesburg

Brian A O'Byrne, Fasken Martineau, Toronto

Assisted by:

Neil Searle, Fasken Martineau, Johannesburg

Nigel Carman

Partner, Johannesburg

Nigel Carman is a partner in Fasken Martineau's Johannesburg Employment department and advises clients on the employment and pension issues arising from various commercial transactions.

His experience spans all areas of employment law but his focus is on advising employers and pension funds on regulatory issues, surplus issues, the interpretation and application of rules and legislation, complaints before the Pension Funds Adjudicator and general restructuring issues.

Across the Energy, Financial Institutions, Life Sciences and Not-For-Profit industries, Nigel advises on employment contracts, personnel policies and procedures and has lead a number of high profile dismissal disputes involving senior executives.

He specialises in restructuring, outsourcing and re-organisation of the workplace, the employment related mergers and acquisitions and tax issues and the interpretation and application of employment statutes and labour law generally.

Honours and Awards

- Recommended by Legal 500 for his Labour, Employment & Human Rights expertise (2013 edition)
- Awarded Employee Benefits Lawyer of the Year by Best Lawyers (2011 and 2012)

Community Involvement

- Chairman, St Mary's School
- Trustee, Roedean School Trust
- Trustee, Anglican Education Trust

Membership/Affiliations

- Member, South Africa Society of Labour Lawyers
- Member, Johannesburg Attorneys Association
- Member, Law Society of the Northern Provinces

Brian A. O'Byrne

Partner, Toronto

Brian O'Byrne practises labour relations, employment and human rights law. He provides general counsel and advice with respect to a variety of matters including restructurings and downsizings, employee terminations, employment agreements and policies, privacy rights, union organizational campaigns, collective agreement interpretation, workers' compensation, pay equity, employment standards and occupational health and safety matters. Brian also represents clients in a full range of litigation matters involving employment, labour and human rights issues before the courts as well as the various tribunals that deal with these matters. He also spends a significant portion of his time negotiating collective agreements on behalf of both private and public sector clients and representing clients before interest arbitration boards. He has particular expertise in interest arbitrations having acted as counsel or employer nominee in well over 100 such cases.

Brian is a frequent speaker on various labour, employment and human rights issues at professional conferences and seminars. Over the last few years, he has spoken at such events in Canada's major centres - Toronto, Montréal, Calgary and Vancouver as well as in the United States of America and England. He also conducts various seminars and training programs for clients.

Brian has also written various articles and commentaries on labour, employment and human rights issues. He is the author of the chapter on Canadian labour and employment law in the European Lawyer Reference book published by Thomson Reuters, entitled *Labour and Employment Law* and is also the editor of the Canadian Chapter in the textbook *International and EU Employment Law* published by Jordans in the United Kingdom.

Brian joined the firm as a partner in 1989.

Honours and Awards

- *Chambers Global*
- *Best Lawyers in Canada*
- *Who's Who Legal* (International and Canadian editions)
- *The Legal Media Group's Guide to the World's Leading Labour and Employment Lawyers*
- Practical Law Company's *Which Lawyer?*

Membership/Affiliations

- Member, Canadian Bar Association
- Member, Ontario Bar Association

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THE ROLE OF INTEREST ARBITRATION IN DEVELOPING ECONOMIES

INTRODUCTION

1. South Africa continues to experience protracted industrial action across various industries which form the lifeblood of our developing economy. It would appear that rather than being a weapon of last resort, negotiations begin from the premise that the parties will not reach an agreement, that a strike will be inevitable, and that the economic power involved in industrial action will be played out in an atmosphere of intimidation and hostility.

2. The economic consequences of industrial action are felt by all. For an employee on strike, the loss of three or four weeks' wages is significant. Often that loss is not made up through the increase obtained through the industrial action. The employee is in a worse off position at the end of it. For the employer, too, there are consequences: a slow-down in or stoppage of production has significant effects on the company's operations. The employer also suffers significant losses with each day that there is no production. The country's economy is also affected through impacts on job stability, investor confidence and a decline in economic growth.

3. The Constitution provides that employees have the right to strike. The Labour Relations Act places limitations on that right in line with section 36 of the Constitution: limitations that are fair and reasonable in an open and democratic society.[1] The right to strike is an important social right. The limitations imposed through the Labour Relations Act give effect to that right in an orderly manner. Yet when measured against the benefits, the economic cost seems inordinately high. Questions therefore need to be asked about whether our collective bargaining system is providing the long-lasting solutions required for a stable economy that needs to grow.

[1] Section 23 of the Constitution of the Republic of South Africa, Act 108 of 1996

4. That question does not ask whether what is demanded by the employee is too much or what is offered by the employer is too little. Rather, the question is whether there is an alternative which the parties to collective bargaining may wish to consider that achieves a similar end result without the consequential economic hardships for all (and none of the associated violence). While industrial action remains a fundamental right which we recognize and which will probably still be considered the appropriate weapon of last resort for resolving collective bargaining disputes, it does, in our view, mark a failure of the collective bargaining process. There are many reasons for this failure. They include a lack of capacity on both sides, structural inequity in the economy, and sometimes sheer bloody-mindedness. Is there another way to avoid these failures?

5. The South African model of collective bargaining and dispute resolution is predicated on a distinction between rights disputes and interest disputes. Employees may engage in protected industrial action over interest disputes but they are required to refer rights disputes to arbitration or adjudication. Probably the most significant area of mutual interest is the terms and conditions upon which employees are employed and, in particular, the wages they earn. This is the subject matter of significant and at the moment very protracted and often violent industrial action.

6. There is one group of employees who may not participate in lawful industrial action even over disputes of interest, namely employees who are engaged in essential services. Employees who are engaged in essential services are required to refer an interest dispute to the CCMA or applicable bargaining council for conciliation. If the dispute cannot be resolved at that stage, it must be resolved through arbitration.

7. Does this process work in South Africa and can it possibly be transported into the private sector and outside the area of essential services? What this paper addresses is whether it may be appropriate to use an arbitration process to resolve disputes over terms and conditions of employment within the private sector in South Africa. Interest arbitrations are used extensively and successfully in Canada so we will outline the process used there and, more particularly, what the key elements are that identify the process as one that is fair and objective and in which both employers and employees can trust.

STRIKES IN SOUTH AFRICA

The right to strike in South Africa

8. The Constitution of the Republic of South Africa gives all employees the right to strike.[2] In *NUMSA & others v Bader Bop & others* (2003) 24 *ILJ* 305 (CC), Ngcobo J said:

> *"The right to strike is essential to the process of collective bargaining. It is what makes collective bargaining work. It is to the process of collective bargaining what an engine is to a motor vehicle."*

9. However, the right to strike is not absolute. The Constitution provides for the limitation of fundamental rights by way of a general limitations clause – section 36. A right in the Bill of Rights may be limited only if it is by way of a law of general application that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. One such law is the Labour Relations Act, 1995 and, more specifically, the procedural and substantive limitations it places on the right to strike. The various limitations are all intended to promote the overt purpose of the Act – orderly collective bargaining.

10. Procedurally, the Act limits the right to strike by requiring that certain formal requirements have to be met before employees may strike lawfully. With regard to substantive limitations, the first limitation is that employees are prohibited from striking in respect of disputes on issues that are the subject of a 'peace clause' contained in a collective agreement. So are strikes in respect of disputes that are regulated by a collective agreement.[3] Similarly, employees may not engage in strike action if they are bound by an agreement that requires the issue in dispute to be referred to arbitration.[4] Furthermore, strike action which might have the effect of endangering life, health or safety is prohibited. Thus persons employed in 'essential services' or a 'maintenance service' are prohibited from engaging in strike action.[5]

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[2] Section 23(2) of the Constitution of the Republic of South Africa Act 108 of 1996
[3] Section 65(1)(a) and section 65(3)(a)
[4] Section 65(1)(b) and (c)
[5] Section 65(1)(d)

11. The substantive limitation on the right to strike has its origins in the underlying philosophy of the Act that certain disputes are best resolved by third party intervention rather than by way of industrial action. These disputes are referred to as 'rights disputes', as opposed to interest disputes. Rights disputes are essentially concerned with the interpretation or application of existing rights, whereas interest disputes have their origin in a failure to agree on new terms and conditions of employment. Rights disputes, subject to limited exceptions,[6] must be submitted to arbitration or the Labour Court. The practicability of extending arbitration to interest disputes is the central focus of this paper.

The South African experience of strikes

12. The number of working days lost to strike action rose to 11.8 million in 2014 compared to 5.2 million in 2013. This sharp rise was primarily due to lengthy strikes in the platinum and engineering sectors which together accounted for 95% of this total.[7] Of these strikes, 98% were triggered by wage disputes.[8]

13. These figures paint a grim picture. Strike action in South Africa has become enormously costly both to workers and also for industry. In some industries lost production can be made up, but in others it is lost forever. What the statistics do not reflect is the extent to which intimidation and violence have also become an inherent part of strike action. These circumstances beg the question: Are collective bargaining agents indeed acting within the assumptions and principles upon which our collective bargaining system is based? The current system seems unable to support a stable growing economy. And is industrial action the only weapon of last resort for resolving collective bargaining disputes?

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[6] Section 65(2)(a). Employees may strike to enforce their right to exercise certain of the organizational rights of trade unions set out in sections 12 to 15 in Chapter III of the Act.

[7] Andrew Levy, 'Wage Settlement Survey Quarterly Report: December 2014', Andrew Levy Employment Publications

[8] Andrew Levy, 'Wage Settlement Survey Quarterly Report, *supra*

The functionality of strikes

14. Under the common law, strike action constituted a fundamental breach of contract, entitling the employer to dismiss employees who went on strike.[9] Although the Industrial Court extended significant protection to employees taking part in 'lawful' strikes in terms of the previous Labour Relations Act, 1956, the emerging jurisprudence was not entirely consistent.[10]

15. Initially in *Die Raad van Mynvakbonde v Die Kamer van Mynwese van SA*[11] the Industrial Court allowed the common-law right of dismissal to trump the right to strike provided it was exercised fairly. This approach was predicated on the need to find a balance between the conflicting interests embodied in a strike.[12] It was accepted that strikes were 'legitimate' if they were 'functional' to collective bargaining or 'conducive to generating conciliatory or sound industrial relations.[13] Functionality, according to this view, involved something more than procedural compliance and allowed the court to enquire into the merits of the strike.[14] A strike in pursuance of demands that could not be met, for example, would not be functional and, accordingly, less deserving of protection.[15] Conversely, unprocedural strikes might also be functional if, for example, they were provoked by the employer or justified by necessity.[16]

16. Nine years later, in *BAWU v Prestige Hotels CC*[17], Combrinck J offered a somewhat different rationale for the protection of strikers taking part in a lawful strike:

> *"Considerations for judging the fairness of the dismissal of lawful strikers are different from those which pertain to an illegal or unprotected strike. A lawful strike is by definition functional to collective bargaining…The right to strike is important and necessary to a system of collective bargaining. It underpins the system – it obliges the parties to engage thoughtfully and seriously with each other…If an employer facing a strike could merely dismiss the strikers from*

[9] *R v Smit* [1995] 1 All SA 54 (C)
[1010] D Du Toit, 'Labour Relations Law: A Comprehensive Guide, LexisNexis, 2015, page 514
[11] (1984) 5 *ILJ* 344 (IC) 361C-E
[12] *Ibid*
[13] *MAWU v Natal Die Castings Co (Pty) Ltd* (1986) 7 *ILJ* 520 (IC) 538E
[14] Du Toit et al, 'Labour Relations Law: A Comprehensive Guide, *supra*
[15] *Barlows Manufacturing Co Ltd v MAWU* (1990) 11 *ILJ* 35
[16] Du Toit et al, 'Labour Relations Law: A Comprehensive Guide, *supra*
[17] (1993) 14 *ILJ* 963 (LAC)

> *employment by terminating their employment contracts then the strike would have little or no purpose. It would merely jeopardise the rights of employment of the strikers and be an opportunity for the employer to take punitive action against the employees concerned.*[18]

17. This approach moved away from the conceptualisation of strikes within a contractual paradigm, recognising that power is necessary for the regulation of employers' and employees' collective interests. Public policy, it implied, should not construe a procedural strike as a repudiation of contractual obligations.[19]

18. In 1996, the Constitution changed the position fundamentally by conferring on all employees a right to strike.[20] This made it necessary to provide statutory protection against dismissal for employees who exercised this right. One of the aims of the Labour Relations Act, accordingly, was to provide such protection in accordance with the Constitution and international law.

19. The Act sought to do this in two ways. First, it abolished the common-law rule by providing that a person did not commit a breach of contract or a delict by taking part in a protected strike or any conduct in contemplation or in furtherance of a strike that complies with the provisions of section 64 of the Act, referred to as a 'protected' strike.[21] Second, it prohibited an employer from dismissing an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of such a strike.[22] Dismissal of an employee for any of these reasons was automatically unfair.[23]

20. Strikes in compliance with the requirements of the Act were thus treated as being 'functional' by definition and given the protection of section 67(4). The rationale for the distinction was more than mere formalism. The procedure laid down in section 64 was crafted with a view to ensuring that the parties would go through a process of genuine conciliation and exhaust the possibilities of reaching a settlement before

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[18] *Supra*, at 971-972
[19] Du Toit et al, 'Labour Relations Law: A Comprehensive Guide, *supra* at page 515
[20] The Constitution of the Republic of South Africa, 1996, section 23(2).
[21] Section 67(1) and (2)
[22] Section 67(4)
[23] Section 187(1)(a)

industrial action could be resorted to. The statutory process, in other words, was designed to encapsulate 'functionality'.[24]

21. Strikes in breach of the requirements of the Act, it follows, were to be 'unprotected' and were to be treated as species of misconduct.[25] Thus, if a strike is 'not linked to collective bargaining and is simply destructive and without demand, the legal protection of that strike is lost'.[26] For instance, once the dispute giving rise to the strike is resolved,[27] or if the strike is in support of an unlawful demand,[28] the right to strike (and its protected status) falls away.[29] In addition, an employer is not precluded from dismissing strikers for reasons related to their conduct[30] or based on the employer's operational requirements[31], both of which fall beyond the ambit of strike action which the Act seeks to protect.

22. The Act has thus narrowed the scope of any possible challenge to the 'functionality' of a strike. Save for the limited circumstances in which an otherwise protected strike may lose its status, there is very little an employer can do to stop a strike that is not functional to collective bargaining. We submit that such strikes are a major cause of the bleak statistics discussed earlier.

23. It goes without saying that if strikes are to be limited on grounds of functionality beyond those discussed above, this is a matter to be dealt with by the labour partners at NEDLAC and the enactment of legislation by parliament which can withstand constitutional scrutiny. These are not issues we explore in this paper. Instead, we seek to present interest arbitration as a viable alternative of resolving the disputes which often lead to industrial action, a step between collective bargaining and the strike as a means of last resort.

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[24] Du Toit et al, 'Labour Relations Law: A Comprehensive Guide, *supra*
[25] Schedule 8, Item 6
[26] Rycroft, 'Can a Protected Strike Lose Its Status?' (2012) 33 *ILJ* 821
[27] *Afrox Ltd v SACCAWU* [1997] 4 BLLR 382 (LC)
[28] *TSI Holdings (Pty) Ltd v NUMSA* [2006] 7 BLLR 631 (LAC)
[29] Du Toit et al, 'Labour Relations Law: A Comprehensive Guide, *supra*
[30] See *CAPPWAWU v Metrofile (Pty) Ltd* [2004] 2 BLLR 103 (LAC)
[31] Section 67(5)

The current 'state of play'

24. Interest arbitration is not unknown in South Africa. There is one group of employees who may not participate in lawful industrial action even over disputes of interest, namely employees who are engaged in essential services.[32] Employees who are engaged in essential services are required to refer an interest dispute to the CCMA or applicable bargaining council for conciliation and if the dispute cannot be resolved at that stage, it must be resolved through arbitration.

25. Does this process work in South Africa and can it possibly be transported into the private sector and outside the area of essential services? What this paper addresses is whether it may be appropriate to use such arbitration process to resolve wage disputes within the private sector in South Africa.

26. In respect of interest arbitrations as an alternative to the right to strike, the Supreme Court of Appeal in South Africa in the *SANDU v The Minister of Defence and Others*[33] matter had the following to say:

> *"Secondly, proceedings before an arbitrator are remarkably akin to a process of bargaining. Each party presents facts and arguments to which the other is at any time entitled to respond by making an offer to negotiate or to settle. Thirdly, the prospect of third party determination is a powerful incentive to parties to settle. This is a well-known phenomenon in the civil courts and other forums flowing from the fact that each party would rather negotiate an outcome that is more or less acceptable to it than be faced with a less acceptable outcome imposed by an outside decision-maker. The incentives to negotiate may in these circumstances be even more powerful than those operating in the case of economic pressure. A weak union might through the process of rational debate before an arbitrator achieve a better result than by exerting such little economic pressure as it is able to bring to bear. On the other hand, a strong union might have a better chance of gaining larger concessions by striking than by resorting to arbitration. But it is certainly not*

[32] Section 74(4)
[33] *SANDU v The Minister of Defence and Others; Minister of Defence and Others v SANDU & Others* [2006] 11 BLLR 1043 (SCA), paragraph 24 per Mpati DP

true to say that the arbitration option is so feeble a remedy that it cannot serve as a substitute for the economic pressure that would ordinarily set the bargaining process in motion."

27. It is therefore not a wholly unknown, unrealistic or untenable option. That said, for such a process to succeed it must not only be fair but must also be perceived to be fair by the parties involved. It requires not only the consent of both parties, but also their commitment and trust in the process. Historically there have been very few arbitrations within the essential services. This suggests a possible lack of confidence in wage arbitrations as a technique for resolving collective bargaining disputes. A lack of confidence, we would suggest, that is misplaced as it is based more on a lack of knowledge than a lack of trust. This paper will demonstrate this.

28. Interest arbitrations are used extensively and successfully in Canada. The result of the widespread use of interest arbitration and its substantial legitimacy has been that there are far fewer public sector strikes in Canada than in South Africa and virtually no violence. Indeed the success of interest arbitration has meant that certain private industries themselves elect to engage in interest arbitration rather than industrial action. However, before discussing the processes used there and which, if any, may be applied locally, we explore some of the key components of any successful interest arbitration process.

What must the arbitrator decide?

29. The conventional approach is for the arbitrator to be free to impose a settlement of choice on the parties. There are however, alternative approaches. One is final offer arbitration: where the arbitrator is required to select one of the party's final offers. The Canadian experience is that final offer arbitrations for the most part do not work: a party's final offer is often in excess of what they would reasonably expect to achieve or the parties insist on keeping a demand on the table in respect of, for example benefits, that the party would ordinarily not expect to be able to achieve through the bargaining process until it goes to arbitration. Because the arbitrator has no ability to find a middle ground, it may result in the parties getting something that they would ordinarily not achieve. This polarises the process.

30. Another is the pendulum approach where the arbitrator must make a decision on each of the items being bargained over based on the offers of the parties on each separate item. This often results in a *"give and take"* where the arbitrator will concede on certain issues for employees while conceding on other issues for the employer. The conventional view is that pendulum process may work depending on the issues. However this does result in a significant trade-off with parties again being able to achieve certain results because of a lack of flexibility being given to the arbitrator. This approach has not found traction in Canada.

31. The appropriate approach we would suggest is for the arbitrator to have the power to decide what is the appropriate order based on the issues in front of him. The fairest approach is to permit the arbitrator to impose a settlement of his or her choice. The concomitant risk of an award against a party, the Canadian experience has shown, causes the parties to seek to achieve a settlement prior to the arbitration process.

INTEREST ARBITRATION IN CANADA

32. In this section, we first describe the Canadian model for interest arbitration, its structure, process and criteria. Then we offer a broad overview of its place and the role it has played in the Canadian experience.

Structure of the arbitration panel

33. The first question is whether the arbitration board will consist of a single arbitrator or whether it will be a panel of arbitrators. The second is whether, if there is a single arbitrator, nominees will be appointed.

34. In Canada the panel consists of an arbitrator and nominees. These nominees are not assessors as we knew from the Industrial Court. The arbitrator retains the right to make the final decision. The nominees are part of the arbitration panel but also represent the parties. They play a dual role in participating in the arbitration process but also seeking to continue the collective bargaining process as they are able to consult the party who nominated them to gain a better understanding for the reasons for different proposals and to put to that party the other party's proposals.

35. The involvement of the nominees is a central feature of the success and legitimacy of the Canadian interest arbitration system. The presence of the nominees on the board gives each party confidence that its point of view will be brought to the attention of the arbitrator by someone familiar with the issues.

36. The nominees are generally drawn from legal representatives or former negotiators. While they are appointed and paid by the party nominating and appointing them, they do not formally represent that party. That would make them too beholden to such a party. Their role, however, is to seek to promote and pursue the interests of the party who has appointed them.

37. The nominees, due to their continuous contact with the party who appointed them and their considerable experience of negotiating settlements have a keen sense of what is achievable in negotiations within the arbitration context. They are on the board of arbitration to protect and advance the interests of the party that appointed them, yet they also play a neutral role. As part of the board of arbitration they have an interest in producing an award that will be generally regarded as fair and as meeting the reasonable expectations of the parties and of the labour relations community.

38. A critical role played by the nominees is their ability to guide the chair of the arbitration not to make a serious error. They can explain that a particular choice will have harmful labour relations consequences that should be avoided. They can frequently offer suitable compromise suggestions that can achieve something of what the party making the proposal wants, without offending the other party. In this position they can assist the arbitrator in achieving an outcome with which both parties can live, neither fully satisfied.

39. The real bargaining in interest arbitrations occurs within the executive sessions of the board of arbitration. After the hearing is complete, the board of arbitration meets by itself, usually some time later. The chair acts as mediator between the two nominees. The nominees may in that process make reasonable concessions to each other, recognising that the demonstrated need for a particular proposed collective agreement change must be established if the proposal is to be awarded. These concessions are not in the form of the party abandoning the demand based on instructions that a nominee

may have received, but the nominees understanding what may be conceded within the context of the negotiations to achieve an agreement.

40. That said, the arbitrator retains the power to make the ultimate decision; he or she conducts the arbitration, and writes the award. Generally the award is given without reasons unless the parties expressly request reasons.

The arbitration process

41. Each party is represented by representatives at the hearing. These representatives prepare briefs and heads of arguments and represent the parties at the hearing. Generally there is no evidence led at the arbitration. This assists in making the arbitration a swift and expeditious process. The parties will prepare a package of documents containing their information and written submissions. The package of documents will usually detail information relating to the issues being negotiated including previous agreements, the description of the bargaining unit, job descriptions or grading details, the employer's budget if it is a public company, articles about the economy and the industry, articles about wage increases, economic and demographic data, wage settlement surveys, and the profile and costing information on employees.

42. At the arbitration hearing, the parties will submit their prepared written briefs. These briefs are sometimes exchanged before the hearing but more commonly are only exchanged at the same time that the briefs are submitted to the arbitrator. The exchange of briefs ensures that the submission of information is properly dealt with and each party has an opportunity to make representations in respect of whatever information is to be submitted.

43. The arbitration usually takes no more than a day with each party being entitled to make submissions to the panel of arbitrators which succinctly summarise the arguments set out in their briefs. Generally no oral evidence is led and all the information is contained in the written briefs. Each party has a right to reply in respect of the information and arguments submitted by the other party.

44. After the hearing and during it, the nominees will caucus with their respective parties and often prior to briefs being finalised and prior to the hearing and/or just after the

hearing. Thereafter the chairperson will meet with the nominees to review the issues and the nominees will advance certain issues of the parties that are most compelling. The chairperson will draft the award for discussion purposes and submit it to the nominees. The nominees caucus with the parties and again meet to discuss or offer suggestions in writing to the chairperson.

45. The award is finally settled by the chairperson generally without reasons unless the parties request reasons. The nominees may write dissenting awards with or without reasons. These are sometimes done for strategic purposes. The panel retains jurisdiction until the agreement is signed and implemented.

Criteria for assessment

46. Canada has had a long (and generally successful) experience with interest arbitration and accordingly we will set out in this section the criteria that Canadian arbitrators have regard to in making their decisions.

47. First of all, it is important to understand the goal of interest arbitration. In this regard a leading Canadian arbitrator - Martin Teplitsky - in a 1991 award said the following:

> *"The goal of compulsory binding arbitration is to ensure that employees affected by the loss of the right to strike fare as well, although no better than, employees whose settlements are negotiated within the customary framework of the right to strike and lock out."*

48. The statutes that impose compulsory interest arbitration on various essential service workers in Canada all set out the factors and criteria that an arbitration board is required to consider. The relevant provision from the Ontario Hospital Labour Disputes Arbitration Act that covers health care workers is as follows:

> *"In making a decision or award, the Board of Arbitration shall take into consideration all factors it considers relevant, including the following criteria:*
>
> *1. The employer's ability to pay in light of its fiscal situation.*

2. *The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.*

3. *The economic situation in Ontario and in the municipality where the hospital is located.*

4. *A comparison as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.*

5. *The employer's ability to attract and retain qualified employees."*

49. Other criteria which are universally applied by arbitrators include:

49.1 the replication principle;

49.2 demonstrated need;

49.3 total compensation approach; and

49.4 decisions not to be based upon views of "fairness" or "social justice".

50. *Replication* is designed to mirror what would have been achieved through free collective bargaining. While the process of reaching a result is different, the end product should be the same. Interest arbitration aims to approximate, as closely as possible, the results of free collective bargaining by the parties. The goal is to balance the interests of the parties as they themselves would have if they could strike or lock-out. The following comments about the replication principle were made by the former Chief Justice of Ontario who sat as an interest arbitrator in a case involving a university and its faculty members:

> *"The replication principle requires the arbitration panel to fashion an adjudicative replication of the bargain that the parties would have struck had free collective bargaining continued. The positions of the parties are relevant to frame the issues and to provide the bargaining matrix. However, it must be remembered that it is the parties' refusal to yield from their respective positions that necessitates third party intervention. Accordingly, the panel must resort to objective criteria, in preference to the subjective self-imposed limitations of the parties, in formulating an award. In other words, to*

adjudicatively replicate a likely "bargained" result, the panel must have regard to the market forces and economic realities that would have ultimately driven the parties to a bargain."

51. The criterion of *demonstrated need* requires a compelling argument and evidence to be advanced to persuade the board that the provision being proposed by that party is warranted having regard to the particular circumstances. A well respected Ontario arbitrator - Ross Kennedy - in an interest arbitration case involving a school board and its secondary schoolteachers articulated this requirement as follows:

> *"An arbitrator must set strict standards to be met before ruling that the clause be imposed upon the reluctant party. The arbitrator must require that the party proposing the clause establish firstly that there is a demonstrated need for the provision desired and secondly that the proposed solution will in fact, deal with the need which is stated."*

52. It is very important that an arbitration board bear in mind that compensation improvements must be looked at in terms of *the total compensation package*. A leading Canadian and American arbitrator - Paul Weiler - made the following comments regarding this in a decision affecting a group of hospitals and their service employees:

> *"I have always thought it essential not to look at any such item in isolation. With rare exceptions, any such proposed improvement looks plausible on its face. The union can point to some number of bargaining relationships where this point has already been conceded. It may even be true that, taken one by one, no single revision will actually cost that much. But, cumulatively, these changes can mount up substantially. Thus, sophisticated parties in free collective bargaining look upon their settlement as a total compensation package, in which all of the improvements are costed out and fitted within the global percentage increase which is deemed to be fair to the employees and sound for their employer that year."*

53. Numerous arbitrators have emphasized the point that, when engaged in the exercise of determining what the parties would have freely negotiated, outstanding matters are not to be decided upon the basis of an *arbitrator's own views as to "fairness" or "social*

justice". This principle has been enunciated in numerous awards including the following two:

53.1 Arbitrator Dorsey in a school board case stated as follows:

> *"The task of an interest arbitrator is to simulate or attempt to replicate what might have been agreed to by the parties in a free collective bargaining environment where there may be the threat to resort to a work stoppage in an effort to obtain demands. This consensus accepts that an arbitrator's notions of social justice or fairness are not to be substituted for labour market and economic realities."*

53.2 The same principle was reflected in a firefighter's case by Arbitrator Knopf:

> *"First and foremost, as a Board of Arbitration resolving an interest dispute, the task is to try to replicate collective bargaining as closely as possible… The task of an interest Board of Arbitration is not to impose terms and conditions that seem attractive or even fair to the Board of Arbitration. Instead, the task of a Board of Arbitration is to design a collective agreement that comes as close as possible to what the parties could have expected to achieve if they had been forced to impasse."*

The Canadian Experience – an overview

54. In this section we have borrowed freely from Chris Albertyn's article "Interest Arbitration: Its Use in Broader Public Sector Disputes in Ontario" 2013 Industrial Law Journal 1677. We are indebted to him.

55. In Canada there are various routes to interest arbitration, some mandatory, some voluntary. In the province of Ontario certain categories of employees — firefighters, police, Toronto transit workers and health care employees — have no right to strike, and the employer has no right to lock out. All unresolved interest disputes between such employers and unions for these employees are referred to compulsory interest arbitration.

56. The model followed generally in Ontario is that whole sectors/industries are declared essential. There is no selection between employees to determine which of their jobs are

essential and which are not. So, for example, all those working in hospitals, nursing homes, municipal homes for the aged, fire stations, police stations, or for the Toronto Transit Commission are treated as essential service employees. This avoids any need for pre-strike/lock-out essential service agreements. Under the Hospital Labour Disputes Arbitration Act (HLDAA), a union or an employer may apply to the Ontario Labour Relations Board (OLRB) for a declaration that the employer's enterprise is a "hospital". If the board makes that declaration the parties will be bound to resolve their interest dispute by arbitration if they are not themselves able to conclude a collective agreement. The applicant in such matters is almost always a trade union, rather than the employer. This suggests that unions think they can do at least as well in arbitration as they might do in collective bargaining, and they can avoid the hardships occasioned by calling or forcing a strike.

57. The exception to the above is with direct employees of the government (Ontario Public Service) and paramedics (ambulance drivers), who have a limited right to strike. Employers and unions representing such employees are required to conclude essential and emergency service agreements prohibiting the right to strike in those parts of bargaining units providing essential and emergency services. While the right to strike, even though limited, prevails, Crown employees who are prohibited from striking under the essential services agreement have no right to interest arbitration. The same strictures apply to ambulance workers where essential service agreements have been made, except that if they can show that their strike is not meaningful because of the impact of the agreement, the OLRB will order that their dispute be referred to interest arbitration. The strike will then end and all ambulance workers and the employer will be subject to interest arbitration and the subsequent award.

58. Teachers have a right to strike, and they can be locked out, unless the successful completion of students' courses of study is put in jeopardy by the strike or lock-out. In that event, an independent commission advises that the risk of such jeopardy exists. This advice effectively recommends legislation ordering an end to the industrial action and referral of the dispute to compulsory interest arbitration. The legislature then likely passes back-to-work legislation and the interest dispute is referred to compulsory

arbitration. In practice, teacher strikes are of relatively short duration because the jeopardy ruling is usually recommended to the legislature where collective bargaining has reached impasse and there is no ready prospect of a settlement. If teachers are legislated back to work then all teachers are affected. There is no determination of some being an essential service and others not.

59. Similarly, the legislature has also passed back-to-work legislation in respect of transit workers who have then been required to engage in compulsory interest arbitration to prevent the hardship to commuters unable to use buses and the subway system in Toronto. Recently, though, the legislature decided to declare transit workers an essential service so all interest disputes are now referred to arbitration. As the whole service has been declared essential, no essential service agreement needs to be concluded.

60. As an economic weapon, the cost of striking in normal economic, industrial conflicts is now so high — what with competition and narrow margins — that the alternative resolution in interest arbitration is often preferable. This has been shown in the arrangements reached by the construction industry in Ontario.

61. The construction industry came to a remarkable resolution of their interest disputes some years ago, now in legislation. The building season is relatively short in Ontario because of the cold winter weather. It runs from April to about October. There is some building work in the winter, but most is conducted in the summer. The arrangement struck by the bargaining parties — organized construction employers and unions — is designed to avoid frequent industrial conflict. All collective agreements must be for three years — from 1 May to 30 April three years later. The right to strike and lock out is restricted to a short period from the expiry of the collective agreement on 30 April to 15 June, a period of six weeks. This is part of the busy construction period in the summer. If a collective agreement is not concluded by 15 June, the strike or lock-out must cease and the conclusion of the next three-year collective agreement is referred to interest arbitration. Strikes and lock-outs can occur therefore only once every three years, in the year in which the collective agreement expires, and for a short period. These arrangements apply to the whole industry. Every construction agreement (for

each of the trades — labourers, carpenters, sheet metal workers, ironworkers, etc) ends on the same date, 30 April, every third year.

62. This structure for collective bargaining in the construction industry has been very successful, with relatively few interest awards. The parties have in large measure been able to conclude the deals themselves over the past decade that the scheme has been in existence. It has brought significant stability to the industry, with everyone knowing how the system works, with guaranteed industrial peace for the duration of the agreements, and with knowledge of what the limits are and how disputes will necessarily be resolved.

63. An interesting and relatively controversial development in Canada in the use of interest arbitration has been the deal between the Canadian Auto Workers Union and the large automobile parts manufacturer, Magna International Inc. in 2007. The agreement covers a large number of workers who were previously not unionized. It has a strong mutual gains focus. In the agreement, the parties have expressly waived the right to industrial action, electing instead to have final offer selection as their method of interest arbitration for determining terms and conditions of employment.

64. Notwithstanding what happened between Magna and the Canadian Auto Workers, resort to interest arbitration in the private sector in Canada has been quite infrequent. There are very few employers and unions that have agreed to invoke interest arbitration. Perhaps the main reason for this is that the traditional system of free collective bargaining seems to be working quite well and both sides are satisfied with it. In Canada's largest province - Ontario - which has a population of close to 14 million people, there were only a total of 31 work stoppages in 2014 covering some 5,492 employees. The average number of days lost per employee involved in the stoppages was 24.1. On an overall basis, these days lost represented 0.01% of the estimated working time at all unionized work places in Ontario.

65. There is a relatively high incidence of the use of arbitration in the public sector. Roughly 30% of broader public sector employees are subject to compulsory interest arbitration. The table below shows that wage increases achieved through arbitration in recent years are largely equivalent to those negotiated by the parties themselves.

In the 11-year period 1998 — June 2009

Settlements		No. employees	Average % increase
Total	3249	3158781	2.7
Arbitrated	407	282903	2.7
Non-arbitrated	2842	2875878	2.7

66. In the last 2 years - 2013 and 2014 - this trend appears to be continuing, at least in Ontario. What is interesting is that in many of the sectors which are covered by interest arbitration, lead arbitration awards in a given sector appear to establish the pattern for that sector and freely negotiated settlements follow suit.

67. The Canadian experience shows that the process tends to avoid the negative consequences of industrial action, namely loss of production, violence and loss of wages. The evidence suggests that employees do at least as well through interest arbitration as they would through collective bargaining and industrial action without any loss of wages. The trade-off for the employers is that they have stability and certainty and that their business continues to operate.

The value of interest arbitration

68. The argument against interest arbitration is that it becomes a substitute for collective bargaining and that it has a 'corrosive and narcotic effect on bargaining' and that parties position themselves for the arbitration rather than bargain genuinely to reach an agreement. The contention is that parties adopt positions they know will not be achieved in bargaining, thus preventing the conclusion of a settlement, in the hope they can accomplish the result at arbitration. They hope to gain in arbitration what they would be unlikely to obtain through bargaining.

69. There are answers to these concerns. The board of arbitration should be sure, before engaging in the arbitration, that the parties have made serious efforts to conclude a collective agreement. If they are not satisfied of this, as for example if there are a very

large number of outstanding issues, the board of arbitration can refer the issues back to the parties for further bargaining before they undertake the arbitration.

70. If unions and employers are satisfied that a fair arbitration process will apply in arriving at their collective agreements — that the process will not disadvantage workers or harm the enterprise — they have shown themselves to be willing to choose interest arbitration.

71. Interest arbitration is potentially a fair substitute for industrial action, provided it is a legitimate process. To be legitimate it must meet the standards of impartiality, independence, competence, expertise and mutual acceptability and it should be relatively expeditious.

72. A political benefit of interest arbitration is that no public figure, nor union leader nor employer representative needs take full responsibility for the outcome of the arbitration process. An independent panel of experts, the board of arbitration, makes the award. The board of arbitration, although it must be broadly acceptable to the labour relations community, is not directly accountable to any constituency; it is an independent body of adjudicators whose responsibility is to arrive at an appropriate award. This enables the parties, when the need arises, to reach compromises they know will be unpopular with their constituencies, and to have those compromises incorporated into the eventual award, as ostensibly the decision of the board of arbitration. In this way, the arbitration process can act as a shield for the parties allowing them to arrive at tough decisions for which it is difficult to garner support.

CONCLUSION

73. In the South African context the primary issue would have to be the confidence of the parties in the arbitrator and in the process - confidence that the arbitrator will not view the matter in a one-sided manner, either in favour of the employees or the employer. The involvement of the nominees in the process goes a significant way to allaying these fears as the nominees are empowered to present the view of the party who nominated them and to convey to that party that they were able to present this to the arbitrator and that it was properly considered.

74. For this approach to gain traction, it will require brave trade unions and equally brave employers to test the possibility of interest arbitrations. To build confidence and experience in the process, this could be done to begin with on issues that are perhaps not very contentious. If the process is successful, and its success would be built in our view very much on the authority and ability of the arbitrators and nominees that are initially appointed, it could be a viable alternative to dispute resolution.

75. The absence of any legislative imperative to engage in interest arbitrations means that any such arbitrations would have to be convened and conducted voluntarily and within the context of a collective agreement. This would enable the parties to set out clearly the terms of reference for the arbitrator and the nominees and would enable the parties to have relative flexibility in exploring or seeking to establish rules for the arbitration process that would provide comfort to each party that they are not giving away an important right or that their interests will not be adequately protected.

Nigel Carman, Fasken Martineau, Johannesburg
Brian A O'Byrne, Fasken Martineau, Toronto
Neil Searle, Fasken Martineau, Johannesburg